No. SC84870

IN THE MISSOURI SUPREME COURT

MISSOURI HEALTH CARE ASSOCIATION, et al.

Plaintiffs/Appellants,

v.

BOB HOLDEN, et al.

Defendants/Respondents.

APPEAL FROM THE CIRCUIT COURT OF COLE COUNTY
Honorable Thomas J. Brown, III

REPLY BRIEF OF APPELLANTS MISSOURI HEALTH CARE ASSOCIATION, et al.

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JURISDICTIONAL STATEMENT

The appeal was originally filed in the Court of Appeals. This Court granted transfer and has jurisdiction. Mo. Const. art. V, § 10.

LEGAL ARGUMENT

I. The trial court erred by concluding that Respondents could lawfully refuse to disburse money that was set aside in the Intergovernmental Transfer (IGT) Fund and appropriated by the General Assembly in § 11.445 of House Bill 11 (2001) for payments to increase the quality of health care provided to nursing home residents because the Governor's power to reduce expenditures below appropriations under article IV, § 27 of the Missouri Constitution was not triggered.

In § 11.445, House Bill 11 (2001) the General Assembly appropriated money from the Intergovernmental Transfer (IGT) Fund to increase the quality of health care provided to Missourians residing in nursing homes. *L.F. 120-21*; *Tr. Exh F 438*; *2001 Mo. Laws 167*. The trial court expressly found: "The § 11.445 IGT Fund appropriation was based upon the [State Fiscal Year] SFY 2002 IGT Fund (Fund 139) revenue estimate." *L.F.121* (Finding ¶ 98*)*; *Appellants' Brief, App. A14*. During SFY 2002, the IGT Fund actually received more revenue than estimated. *L.F. 100, 114, 116*; *Tr. Exh F 778, 1115-17*. In fact, the IGT Fund received enough revenue to satisfy all appropriated expenditures from the Fund, plus an additional **$60,000,000**. *L.F. 116*.

Article IV, § 27 lets the Governor "reduce the expenditures of the state or any of its agencies whenever the actual revenues are less than the revenue estimates upon which the appropriations were based." Even though revenue for the IGT Fund was $60,000,000 more than estimated, the Governor invoked § 27 and reduced the expenditures of the Department of Social Services below the amount appropriated from the IGT Fund in

§ 11.445. *Tr. Exh F 1151-52*. The trial court specifically found that the Governor implemented this withholding in response to a revenue shortfall in a different Fund – the administrative General Revenue Fund (Fund 101). *L.F. 94-95, 123* (Finding 113).

In their initial Brief, Appellants explained that the Governor's withholding of § 11.445 IGT Fund expenditures was unlawful, because his power under article IV, § 27 was not triggered. The trial court erred as a matter of law in adopting Respondents' whole budget theory, which lets the Governor reduce **any** expenditure of **any** state agency or other government entity below **any** appropriation from **any** of the more than 450 Funds in the State Treasury when revenues for the state as a whole are less than the total amount appropriated or the consensus general revenue estimate.

1. Article IV, § 27 does not adopt Respondents' whole budget theory.

Respondents' primary theory is that the Governor can reduce expenditures, in their own words, as "he sees fit." *Respondent's Brief 8, 9, 24*. To justify this sweeping power, Respondents argue that article IV, § 27 should be broadly construed so that the words "expenditures" and "appropriations" in that section refer to expenditures of appropriations collectively, rather than to individual appropriations. *Respondents' Brief 16-17, 24, 28*. They argue every appropriation is an appropriation to the "state," and that the state's appropriations are collectively based on a state revenue estimate. *Respondents' Brief 9, 15-16*. Similarly, they argue appropriations for an agency comprise another set of appropriations, which are collectively based on their own revenue estimate. *Respondents' Brief 9, 15-16*. Finally, they offer that § 33.290 – the Fund specific allotment statute – provides a third subset of the appropriations: appropriations

from Funds. *Respondents' Brief 9, 15-16, 18*. Thus, according to Respondents, any particular appropriation is simultaneously based on different revenue estimates: (1) a whole state revenue estimate; (2) an agency revenue estimate; and (3) a Fund revenue estimate. *Respondents' Brief 9, 29*.

This confusing "plain text" interpretation is offered to explain the plain meaning of § 27. It is neither "plain" nor does it follow the "text" of this Constitutional provision, the Fund system, or the principle of Separation of Powers. Instead, the true plain meaning of § 27 is that the Governor can reduce a particular expenditure of an agency or the State below the amount specified in a particular appropriation only when actual revenue is less than the revenue estimate upon which that appropriation was based. Since revenue is segregated in the Treasury by Fund, when the General Assembly appropriates from a Fund, it bases its appropriations on the revenue estimate for that Fund.

Respondents contend Appellants' textual interpretation is too narrow and ask this Court to construe § 27 broadly. *Respondents' Brief 13-15*. But, because § 27 lets the Governor exercise **legislative** power, it must be strictly construed. *See, e.g., State ex rel. Cason v. Bond*, 495 S.W.2d 385, 392 (Mo. banc 1973). Separation of Powers is violated in two instances: (1) when one branch impermissibly interferes with another branch in the exercise of its power; (2) when one branch assumes a power more properly belonging to another branch. *State Auditor v. Joint Comm. on Legislative Research*, 956 S.W.2d 228, 231 (Mo. banc 1997). Respondents argue repeatedly that the § 27 power is not legislative because it occurs after the appropriation laws are enacted. *Respondents' Brief 13, 14, 15, 20, 23*. This observation only demonstrates that the Governor is not

"interfering" in the lawmaking process. However, Separation of Powers is also violated if one branch assumes a power that more properly belongs to another branch. *State Auditor*, 956 S.W.2d at 231. As Appellants explained in their initial Brief, § 27 lets the Governor assume a limited amount of power that generally belongs to the legislature. *Appellants' Brief 54-63*.

When the Governor exercises his § 27 power, he is prohibiting execution of an appropriation law by a distinct constitutional actor (DOSS, in this case). *Appellants' Brief 55-59*. This power is tantamount to a repealing or modifying a law – a legislative power that the Governor would not have unless § 27 gave it to him. *See, e.g., Bd. of Educ. of the City of St. Louis v. State*, 47 S.W.3d 366, 371 (Mo. banc 2001). *See also* Abner J. Mikva & Michael F. Hertz, *Impoundment of Funds*, 69 Nw. U. L. Rev. 335, 376 (1974) ("The power to repeal or nullify a law is a legislative power. Since impoundment in effect repeals a law, the President violates [the provision vesting legislative power in Congress] when he withholds funds."). Since § 27 lets the Governor assume legislative power, it must be strictly construed.

Respondents' textual justification for the "whole budget" theory is that § 27 refers to the "state or any of its agencies." *Respondents' Brief 15-17*. They contend that the plain meaning of this phrase is that the second clause of § 27 creates two separate powers: (1) the power to reduce any expenditure below any appropriation when revenue for the state as a whole is less than estimated and (2) the power to reduce any agency expenditure below any appropriation to that agency when revenue for that agency was less than estimated. *Respondents' Brief 15-17*. Their position is that "expenditures" and

"appropriations" do not refer to individual expenditures and appropriations. *Respondents' Brief 28*. Rather, they claim that those terms refer **collectively** to all state appropriations or all appropriations to an agency. *Respondents' Brief 15-17, 28*.

This interpretation is far from plain. In fact, it borders on the absurd. The absurdity is best illustrated by their "agency" power argument. Agencies do not have revenues. For example, no agency can claim the individual income tax revenue of the State. It is deposited in the administrative General Revenue Fund (Fund 101), and distributed to many agencies. *See Tr. Exh F 499* (noting that individual income tax revenue is part of the revenue in administrative General Revenue Fund); *2001 Mo. Laws 1-292* (SFY 2002 appropriation bills). Agencies are appropriated money from numerous Funds, and money in a Fund can be appropriated to numerous agencies. *See, e.g., 2001 Mo. Laws 1-292*. It would be impossible to calculate or estimate "revenue" for an agency, because agencies do not "have" revenues. Thus, Respondents' Brief is completely devoid of any example of how or when a Governor could ever reduce expenditures on an agency-by-agency basis.[1]

[1] The whole budget prong of their theory is no less absurd. It requires the Court to ignore the constitutionally required segregation of revenue in Funds in the Treasury. *See, e.g.*, Mo. Const. art. IV, §15 (money in the Treasury is held for the benefit of its respective Fund); Mo. Const. art. IV, § 47(b) (requiring the deposit of certain tax revenue into specific Funds).

Contrary to Respondents' approach, the plain meaning of the word "appropriation" is that it refers to specific authorization to expend money from the Treasury. The related group of Constitutional provisions, article IV, §§ 22-27, 28, uses the term "appropriation" to refer to appropriations individually. When these provisions refer to all appropriations collectively, they use the different word "budget." Mo. Const. art. IV, §§ 24, 25.

The Constitution is very specific about the elements of "appropriations." They must specify (1) the amount, and (2) purpose. Mo. Const. art. IV, § 23. They can also specify (3) the account. Mo. Const. art. III, § 23. Thus, an "appropriation" authorizes use of a specific amount of revenue for a specific purpose segregated in a specific account. The elements of an appropriation are inextricably intertwined. *State ex inf. Danforth v. Merrell*, 530 S.W.2d 209, 213-14 (Mo. banc 1975). The exact text of individual appropriations must be followed. Mo. Const. art. IV, § 28. "This Court has carefully guarded the Constitutional command not to spend the people's money in a manner other than authorized by an appropriation law. . . . Compliance with the law is, of course, required to assure the integrity of the appropriation process." *State ex rel. Teasdale v. Spainhower*, 580 S.W.2d 303, 306 (Mo. banc 1979).

Respondents' approach is calculated to allow the Governor to withhold money appropriated from a Fund that is not experiencing a revenue shortfall. *Respondents' Brief 24*. In effect, Respondents treat the treasury as one common Fund. To them, the only legislatively significant act is the total amount appropriated for the entire budget. *Respondents' Brief 23-24*. Thus, under Respondents' theory the Governor may withhold

"as he sees fit," without any check or balance, and without regard for the fiscal priorities determined by the legislature. *Respondents' Brief 8-9, 23-24*.

This Court has already rejected this approach in the *Merrell* case. In a lone dissent, Judge Morgan advocated the same sort of collective interpretation of appropriations as Respondents urge here. *Merrell*, 530 S.W.2d at 215-16 (Morgan, J., dissenting). The *Merrell* majority held that appropriation authority cannot be "transferred" between purposes after the laws are enacted. *Id*. at 213-14. In dissent, Judge Morgan posited a hypothetical in which an agency underestimates its Repair and Replacement appropriation, but overestimates its needs for Operations. *Id*. at 216 (Morgan, J., dissenting). If the agency needed extra money for Repair and Replacements, he believed that "transfers" between appropriations were justified as long as the agency remained "within the general appropriation limits assigned to that unit of government." *Id*. Judge Morgan would have not tied the constitutional purpose and amount requirements to individual appropriations. *Id*. Rather, he thought that the constitutional requirements were satisfied by a general appropriation for the agency's benefit, and that additional specificity was simply used "for reasons of accounting and planning." *Id*. Just as Judge Morgan was willing to overlook the specific purpose in the individual appropriation laws, Respondents ignore the particular accounts from which the General Assembly appropriates. *Respondents' Brief 15-16, 24*.

Properly interpreted, the phrase "state or any of its agencies" identifies the entities whose expenditures can be reduced below appropriations. Those words do not affect when the power is triggered, nor do they affect the scope of the power when triggered.

The history of the constitutional convention confirms this interpretation. As originally drafted, the pertinent language in article IV, § 27 was "state departments, offices and agencies." *Report of Comm. on State Finance (Except Taxation) No. 11*, File No. 14 in the 1943-44 Constitutional Convention of Missouri at 4. The Committee on Phraseology, Arrangement and Engrossment substituted the present language – "the state or any of its agencies" – for this phrase. *Report No. 1 of Comm. No. 23 on Phraseology, Arrangement and Engrossment*, File No. 14 in the 1943-44 Constitutional Convention of Missouri at 8-9. Thus, the section was intended to encompass state agencies and any other entity that is the "State."

Similar words are used to the same effect in related constitutional provisions. Article IV, § 23 states: "The fiscal year of the state and all its agencies shall be . . . " Clearly, § 23 is using the "state and all its agencies" as an all encompassing term for every state entity. Likewise, under article IV, § 24, the Governor's must prepare an "itemized plan of proposed expenditures of the state and all its agencies." Again, the phrase is used as an all encompassing term for every state entity.

Respondents also try to distinguish between the allotment power in the first clause of § 27 and the power to reduce expenditures below appropriations in the second clause. *Respondents' Brief 16*. They argue that the power to reduce "expenditures" is broader than the power to allot "any appropriation" because the latter term is singular. *Respondents' Brief 16*. They are wrong. The modifying phrase "of the state or any of its agencies" shows that the second clause of § 27 only operates on particular appropriations to particular state entities. Mo. Const. art. IV, § 27. By way of contrast, the allotment

power applies to "any appropriation" and the Governor can use it without regard for which state actors are affected.

The plural wording is also consistent with Appellants' interpretation. The terms in the second clause of § 27 are plural, because there are multiple appropriations from any Fund. Also, there are a variety of Funds in the Treasury, each with their own actual revenue source and revenue estimate. When a Fund experiences a revenue shortfall, the Governor can reduce expenditures below any of the appropriations from that Fund. By using plural terms, § 27 recognizes that different appropriations are made from different Funds and that the Governor's power can be triggered to affect multiple appropriations.

Respondents argue that, unless the whole budget theory is adopted, § 33.290, RSMo 2000 will be rendered a meaningless repetition of the Constitution. *Respondents' Brief 17-18*. First, § 33.290 is not a meaningless repetition of article IV, § 27. Section 33.290 provides for agency work programs and the Governor's 3% withhold. These provisions are not mentioned anywhere in the Constitution. It also contains more detailed instructions regarding the Governor's power to withhold and allot. §33.290. Thus, § 33.290 has independent meaning.

Second, Respondents wrongly invoke the canon of construction that provisions with different language have different meanings. *Respondents' Brief 18*. Where a constitutional provision is modeled on a statute, that rule has limited application. Constitutional provisions and statutory provisions serve very different functions. Constitutions are meant to endure over time. It is easier to change a statute than to amend the constitution. Therefore, constitutional provisions use more general language.

As Appellants' historical analysis demonstrates, the statute pre-dated the constitutional provision. *Appellants' Brief 41-45*. As a matter of timing the statute cannot be a "meaningless repetition of the Constitutional provision," since the statute came first. *Respondents' Brief 18*. Respondents are really arguing that the Constitution is a meaningless repetition of the statute. However, it was appropriate for the drafters of the 1945 Constitution to constitutionalize the principles in § 33.290, adopting different wording appropriate for a constitutional provision. In fact, the history of § 27's adoption shows that is just what the drafters did. *Appellants' Brief 41-46*. The constitutional budget sections "freeze into the Constitution a system of executive budget control very much in accord with the present system of budgeting control in the State of Missouri." *1943-1944 Constitutional Convention Debate*, Vol. XI at 3116-17 (May 19, 1944). Section 27 conferred power "already vested in the Governor by statute." Martin L. Faust, *Constitution Making in Missouri: The Convention of 1943-44*, at 88 (1971).

Respondents next contend that the Office of Administration, Division of Budget and Planning, interprets article IV, § 27 to adopt the whole budget theory. *Respondents' Brief 19*. They argue this administrative interpretation should be given weight because the Division of Budget and Planning is charged with execution of article IV, § 27. *Respondents' Brief 19*. They are wrong. The Governor – not the Division of Budget and Planning – is responsible for implementing § 27 withholdings. Mo. Const. art. IV, § 27. Therefore, only the Governor's administrative interpretation is entitled to consideration.

As Appellants' Brief explained, in 1945 and 1997 the Governor approved bills that specifically equated the Governor's power to withhold with the § 33.290 standard.

Appellants' Brief 46-48. Thus, the official interpretation of the officer charged with executing § 27 – the Governor – is that the power is triggered for Funds that experience revenue shortfalls. *Appellants' Brief 46-48*. The trial testimony of Jim Carder[2] is entitled to no consideration. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988) ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate."); *see also Cason*, 495 S.W.2d at 393 (prior practice "cannot enlarge the constitutional authority of the Governor").

Finally, the "whole budget" theory is not, as Respondents argue, consistent with the principle of Separation of Powers. *Respondents' Brief 20-24*. If the "whole budget" theory is adopted, the effect will be to destroy the General Assembly's ability to set certain revenues aside for certain purposes. Respondents openly advocate this result, arguing that Funds with surplus revenue should not be held "harmless" when other Funds receive less revenue than estimated:

> This approach holds harmless "funds" for which an agency or the General Assembly mistakenly or intentionally under-

[2] Carder testified that he is actually head of the Office of Administration, Division of Accounting – not the Division of Budget and Planning. *Tr. at 117*. Respondents cite statutes which refer to the authority of the Division of Budget and Planning. *Respondents' Brief at 19* (citing §§ 33.030, 33.210, RSMo). There is no indication that Carder has any responsibility for implementing article IV, § 27, even under Respondents' theory. His testimony is entitled to no weight.

> estimated revenues. It reserves its severe impact for funds for which an agency artificially inflated anticipated revenues or from which the legislature – perhaps intentionally – severely over-appropriated.

Respondents' Brief 24.

As Respondents implicitly acknowledge in this quote, the Governor can maintain a balanced budget Fund-by-Fund. Thus, this case is not about the Governor's ability to balance the budget. Rather, the issue is whether the Governor can balance the budget by shifting the burden of a revenue shortfall from one Fund to a different Fund. The General Assembly establishes Funds to segregate revenue sources. It then appropriates that revenue for specific purposes. By withholding from a Fund with ample revenue to offset a shortfall to another Fund, the Governor ignores the fiscal policy of the General Assembly as reflected in the appropriation laws. *See*, *e.g.*, Mikva, *supra*, at 337 ("Impoundment is a raw assertion of [unbridled] power contravening not only the Constitution but our whole philosophy of government.").

Without a constitutional provision like § 27, the Governor could not reduce the expenditures of an agency below the amount appropriated. *Appellants' Brief 54-63.* Section 27 confers that legislative power on the Governor. Therefore, it must be strictly construed so the Governor may reduce expenditures below appropriations from a Fund when revenue for that Fund is less than estimated, but cannot reduce expenditures below the appropriations for other, unrelated Funds with ample revenue.

2. There is no revenue estimate upon which the whole state's appropriations were based.

The "whole budget" theory is wrong as a matter of law. Therefore, the Court need not consider whether there is a revenue estimate that is the "basis" for every appropriation in the state budget. Nonetheless, consideration of Respondents' steadfast assertion that every appropriation in the state budget is based on the consensus general revenue estimate shows that they are incorrect. *Respondents' Brief 25-27*.

The trial court rejected Respondents' argument as a question of fact, finding only that the whole state's appropriations were based "in part" on the consensus general revenue estimate. *L.F. 115* (Finding 52). That "part" consists of the appropriations from the administrative General Revenue Fund (Fund 101). The consensus revenue estimate cannot be the basis for all appropriations. Among the **450** Funds in the Treasury, the consensus general revenue estimate includes revenue for **one** Fund. *L.F. 99*; *Tr. 230-31*. Every other Fund in the Treasury is excluded from the consensus revenue estimate. *L.F. 99; Tr. 237*. The amount of money excluded is not small. For SFY 2002, the consensus general revenue estimate was about $6.9 billion. *Tr. 255*. In the Governor's budget, total estimated state expenditures were $19,000,220,633. *L.F. 100* (Stipulation 61). Thus, the Governor expected more than $12,000,000,000 (billion) of revenue that was not included in the consensus general revenue estimate. The consensus revenue estimate includes approximately one-third of state revenue. It is absurd to conclude that the Governor and General Assembly based every appropriation on this partial estimate.

3. The § 11.445 IGT Fund appropriation was not based on the consensus general revenue estimate (which only estimates revenue for the administrative General Revenue Fund) or a non-existent revenue estimate for the statutory General Revenue Fund.

The trial court expressly found the § 11.445 IGT Fund appropriation was based on the IGT Fund revenue estimate. *L.F. 121* (Finding 98); *see Appellants' Brief A14*. This conclusion is dictated by the law, facts, and logic.

Respondents recognize that the trial court ruled this issue against them. Thus, in footnote 6, they assert:

> The trial court mistakenly followed the nursing homes' lead and found that the appropriation "was based upon the SFY 2002 IGT Fund revenue estimate." This finding was wholly unsupported. There was no evidence to that effect before the trial court and therefore that finding should be disregarded.

Respondents' Brief 29 n.6.

This offhand allegation of trial court error preserves nothing for review. Ordinarily, only the appellant may allege error. *See, e.g., Martin v. Fulton Iron Works Co.*, 640 S.W.2d 491, 495 (Mo. App. 1982). However, the respondent may allege error if (1) it supports the trial court judgment and (2) the error is properly presented. *See, e.g., id.*; *Cascio v. Garrett*, 535 S.W.2d 272, 274 (Mo. App. 1976). To preserve trial court error for appellate review, Respondent was required to raise the error in a Point Relied On. *Oertel v. John D. Streett & Co.*, 285 S.W.2d 87, 98 (Mo. App. 1955). Errors alleged

only in the legal argument section of a brief are not properly presented. *Thummel v. King*, 570 S.W.2d 679, 686 (Mo. banc 1978); *J.A.D. v. F.J.D.*, 978 S.W.2d 336, 338-39 (Mo. banc 1998). Allegations of error relegated to **footnotes** are certainly not properly presented. *Id.*

Respondents likely did not carry this alleged error as a Point Relied On, because it is completely unfounded. The finding was amply supported. Nonetheless, Respondents wrongly assert that Appellants did not introduce evidence on this issue. *Respondents' Brief 29 n.6*. In fact, the parties stipulated to many of the supporting facts. *L.F. 94-96, 98*.

The following evidence supports the finding that the § 11.445 IGT Fund appropriation was based on the SFY 2002 IGT Fund revenue estimate:

(1) money in the Treasury is segregated by Fund (*L.F. 94*);

(2) all money in the Treasury is deposited into a Fund (*L.F. 94*);

(3) each Fund is a separate accounting unit in the Treasury (*L.F. 94*);

(4) the IGT Fund is a unique Fund in the Treasury (*L.F. 95*);

(5) revenues and expenditures for the IGT Fund are accounted for separately from all other money in the Treasury (*L.F. 94-95*);

(6) in § 11.445, the General Assembly expressly appropriated money for the disputed payments from the IGT Fund (*L.F. 98*);

(7) the Governor approved § 11.445 without veto (*L.F. 98*).

These facts were sufficient to support the trial court's finding. If a Fund is a distinct accounting unit, then the General Assembly must base its decision to appropriate money

from the Fund on how much revenue it estimates the Fund will receive. Without such an estimate, the General Assembly has no idea how much money is available.

Other facts also supported the finding:

(8) for SFY 2002, DOSS and the Governor prepared separate revenue estimates for the IGT Fund (*Tr. 221-23, 225*; *Tr. Exh F 696, 778, 1115*);

(9) both revenue estimates were available to legislators (*L.F. 99*; *Tr. 204, 223, 226-27*);

(10) the Governor recommends expenditures from Funds assuming sufficient revenues for the Fund to support those expenditures (*Tr. 217-18, 221-22, 239*);

These facts show that Fund revenue estimates occupy a prominent role in the budgeting process, and that budgeting and appropriation decisions are made with estimated Fund revenues in mind. Thus, they support the finding that the General Assembly based the IGT Fund appropriation on its estimate of revenue for the IGT Fund.

Conversely, important facts excluded the alternatives proposed by Respondents. The §11.445 IGT Fund appropriation could not be based on the consensus general revenue estimate because:

(1) the consensus general revenue estimate only estimates revenue for the administrative General Revenue Fund (Fund 101) (*L.F. 99*);

(2) money in the administrative General Revenue Fund and the IGT Fund is accounted for separately (*L.F. 95*);

(3) the consensus general revenue estimate does not estimate any revenue for the IGT Fund (*L.F. 99*);

(4) the consensus general revenue estimate is prepared in January, months before the appropriation bills are truly agreed to and finally passed and approved in May and June (*L.F. 99*; *Tr. 229*; *Tr. Exh F 470, 499*; *2001 Mo. Laws 175, 188, 194*);

(5) revenue estimates change during that time (*L.F. 96*; *Tr. 124, 203*);

(6) the consensus general revenue estimate is not enacted as a law – it is agreed to by the Governor and the chairs of the Senate Appropriations Committee and the House Budget Committee (*Tr. 253*).

The only support for Respondents' suggestion that the IGT Fund appropriation was based on the consensus general revenue estimate was the testimony of Budget Director Brian Long. *Respondents' Brief 29-30* (citing Tr. 371-74). Long, however, did not testify that the IGT Fund appropriations were based on the consensus general revenue estimate. He said that **his** recommendations to the Governor about line-item veto decisions for IGT Fund appropriations were based on the consensus general revenue estimate. *Tr. 373-74*. The trial court had the opportunity to observe this witness, and apparently found his testimony irrelevant. The trial court found that the § 11.445 IGT Fund appropriation was based on the SFY 2002 IGT Fund revenue estimate. *L.F. 121*

The IGT Fund appropriation was not based on the statutory General Revenue Fund because:

(1) the General Assembly appropriated from the IGT Fund – not the statutory General Revenue Fund (*L.F. 98)*;

(2) the statutory General Revenue Fund contains different administrative Funds which are distinct from the IGT Fund (*L.F. 95*; *Tr. 128*);

(3) revenue for the statutory General Revenue Fund can only be estimated by aggregating the revenue estimates for the administrative Funds that comprise it (*Tr. 296, 299-300*; *Respondents' Brief 40-41*).

These facts were more than sufficient to justify the trial court's conclusion that the IGT Fund appropriation was based on the General Assembly's expectation of revenue for the IGT Fund and not for the statutory General Revenue Fund. Thus, Finding 98 was supported by substantial and competent evidence. Respondents' offhand allegation of error in a footnote is baseless.

Respondents chastise Appellants for their "consistent fixation on the ultimate appropriation bills" and for focusing on "the ultimate product of the appropriation process." *Respondents' Brief 34, 39*. Article IV, § 27 specifically requires an inquiry into the revenue estimates upon which the appropriations were based. Appropriations are laws, passed by the General Assembly and approved by the Governor. Though Appellants were abundantly cautious and introduced evidence of different revenue estimates generated for the IGT Fund during the SFY 2002 budget process, the best interpretation of § 27 is that the revenue estimate is the estimate agreed to by the General Assembly and Governor in the appropriation bills. Appellants so stated in their original brief. *Appellants' Brief 36-41*. No other estimate was passed through the article III

lawmaking process. Therefore, no other estimate is the official estimate of the General Assembly and the Governor.

The intent of the Governor and the General Assembly is determined from the plain text of the appropriation laws. The General Assembly finally passes the original appropriation bills. Mo. Const. art. III, § 27. The Governor can then veto and line-item veto appropriations. Mo. Const. art. III, § 31; Mo. Const. art. IV, § 26. Finally, the General Assembly can override the Governor's vetoes. Mo. Const. art. III, § 32. The total amount appropriated from each Fund designated in an appropriation bill is the minimum amount of revenue that the Governor and General Assembly estimate for that Fund. It is the only revenue estimate that the Governor and the General Assembly have agreed on through the constitutional process.

The cases are clear that legislative intent behind appropriation laws is discerned from the text of the laws, not from the subjective intent of the Governor or individual legislators. *See Appellants' Brief 36*. Respondents nominally acknowledge that individual legislators cannot determine legislative intent, but then argue that the testimony of one of the Governor's subordinates was "highly relevant" and should have been relied upon. *Respondents' Brief 30-31*. Respondents repeat this error throughout their Brief. They elevate the Governor above the General Assembly in the appropriation process. In this instance, they argue that the subjective intent of one of the Governor's assistants should determine upon which revenue estimate the General Assembly based its appropriations. But, the General Assembly, not the Governor, is responsible for enacting the appropriations. Mo. Const. art. III, §§ 1, 36; Mo. Const. art. IV, § 28.

Respondents also posit that the General Assembly could "manipulate" the process by appropriating more or less than they expect. *Respondents' Brief 24*. This assertion is curious. Respondents contend that passing or not passing additional appropriation **laws** is a manipulation of the appropriation process. Again, Respondents denigrate the role of the General Assembly in the appropriation process, arguing that the General Assembly will obstruct the Governor in implementing his preferred policies. To the contrary, the Governor must implement the **General Assembly's** policies as reflected in its appropriations laws. At any rate, legislators swear to uphold the Constitution of Missouri and faithfully perform their duties. Mo. Const. art. III, § 15. Though individual legislators might attempt to over or under estimate revenue, other legislators will likely counteract their influence. The only way to know the collective intent of the General Assembly is to examine the text of the laws finally passed. The record before this Court does not support Respondents' bad faith claims about the General Assembly.

Respondents also assert that the § 11.445 IGT Fund appropriation must have been based upon the consensus revenue estimate because article IV, § 24 requires the Governor to submit a revenue estimate. *Respondents' Brief 26, 33-34*. They imply that the consensus revenue estimate is the only revenue estimate submitted with the Governor's budget to comply with article IV, § 24. To the contrary, article IV, § 24 requires comprehensive estimates of the state's revenues. Under § 33.270(2), the Governor must estimate revenue for each Fund in the Treasury. § 33.270(2), RSMo 2000. The consensus general revenue estimate does not satisfy the constitutional or

statutory requirements, because it only estimates revenue for one Fund, comprising only about one-third of the budget. *L.F. 99*.

Mark Reading, the Office of Administration official who supervised production of the Governor's SFY 2002 budget, testified that the Governor submitted the Fund revenue estimates required by article IV, § 24 and § 33.270(2) in the executive budget. *Tr. 198-99, 221-23*; *Tr. Exh F 1114-15*. Reading testified that the Governor implicitly estimated revenue for each Fund by recommending expenditures from the Fund. *Tr. 221-23, 225*. Thus, the Governor estimated that revenue for the IGT Fund would be $ 94,603,301. *Tr. Exh F 696*. If this Court believes that the article IV, § 24 revenue estimates are the same revenue estimates as those mentioned in article IV, § 27, Appellants still prevail because actual revenue to the IGT Fund was $265,000,000 more than the Governor's article IV, § 24 revenue estimate for the IGT Fund.

However, this theory would likely prove unworkable. The Governor's article IV, § 24 estimates of revenue are prepared in January, months before the appropriation bills are passed. *Tr. Exh F 470*. In the interim, legislators and their staff confer with the Governor, the Office of Administration, and other agencies to revise revenue estimates. *L.F. 113-14*; *Tr. 124, 203*. The only way to tell how much revenue the General Assembly and Governor estimated for particular Funds at the time they passed the appropriation bills is from the appropriation laws.

4. Actual revenue for the IGT Fund was less than all revenue estimates for that Fund.

In this case, article IV, § 27 was not triggered for the § 11.445 IGT Fund appropriation because the $363,000,000 in actual revenue to the IGT Fund was $60,000,000 more than the highest revenue estimate – the amount appropriated from the Fund by the General Assembly after the Governor had exercised his line-item veto and the General Assembly had an opportunity to override those vetoes. *L.F. 116*. Even though the General Assembly specifically appropriated this money from the IGT Fund, Respondents contend that the withholding was proper because revenue for the administrative Funds of the statutory General Revenue Fund was collectively less than estimated. *Respondents Brief 37-39*. But, § 11.445's IGT Fund appropriation authorized expenditures from the IGT Fund (Fund 139) – not the statutory General Revenue Fund (Fund 101). *L.F. 120-21*; *2001 Mo. Laws 167*. Therefore, as the trial court found, it was based on the IGT Fund revenue estimate. *L.F. 121* (Finding 98).

Nothing in the record before this Court supports Respondents' claim that the General Assembly based its § 11.445 IGT Fund appropriation on a combined revenue estimate for the statutory General Revenue Fund. The accounts within the statutory General Revenue Fund are Funds – separate accounting units. *L.F. 94-95*. Revenue to and expenditures from administrative funds are accounted for separately. *L.F. 94*. The General Assembly has expressly established the administrative Funds "to control expenditures." § 33.571.2, RSMo 2000. It has also forbidden itself to appropriate from the statutory General Revenue Fund without designating the specific accounts from which it is appropriating. *Id*. Thus, § 33.571.2 creates independent administrative Funds

which can be set aside and used only for the purposes specified in the appropriation bills and no others.

Respondents wrongly assert that "the fact that the appropriation item here referred to the 'IGT Fund' does not create the fund or give it character separate and apart from what § 33.372 requires."[3] *Respondents' Brief 31-32*. To the contrary, the General Assembly "establishes" the administrative Funds when it appropriates from them. § 33.571.2, RSMo 2000 ("**When enacting appropriations, the general assembly may establish such accounts** within the general revenue fund as it deems necessary and appropriate to control expenditures" (emphasis added)). The decision to appropriate from an administrative Fund reflects the General Assembly's decision that a specific revenue source set aside in that account should be used for purposes specified in its appropriation bills. Because they must be maintained as separate accounts to control expenditures, the "accounts" are independent accounting units. *L.F. 94-95*.

Respondents next complain that "account" in § 33.571.2, RSMo 2000 must have a different meaning from the word "funds" as used in different statutes. *Respondents' Brief 38*. While this distinction could conceivably be relevant in a different case, it has no bearing here. There is considerable overlap between the meaning of the words "fund" and "account." *Compare* Mo. Const. art. IV, § 15 (money is held for the benefit of its

[3] Section 33.372 does not exist. Appellants assume Respondents are referring to § 33.571.

"fund") *with* Mo. Const. art. III, § 23 (the General Assembly may designate the specific "account" from which it is appropriating). As the General Assembly, the Office of Administration, the Governor, and the Treasurer have all recognized, the accounts within the statutory General Revenue Fund are "Funds." *Tr. 328*; *Tr. Exh F 696, 1163, 1184-95*; *2001 Mo. Laws 167*.

The important point is that the administrative IGT Fund is a separate accounting unit within the Treasury. *L.F. 94-95.* The General Assembly must and does appropriate from it. § 33.571.2. A specific revenue source – IGT program revenue – is set aside in that Fund. *L.F. 97*. In appropriating from this independent accounting unit, the General Assembly based its decision on the revenue estimate for that Fund. *L.F. 121* (Finding 98).

II. The trial court erred by concluding that the Respondents could lawfully refuse to disburse federal money that was set aside in the Title XIX Fund and appropriated by the General Assembly in § 11.445 of House Bill 11 (2001) for payments to increase the quality of health care provided to nursing home residents.

Respondents mischaracterize Appellants' legal argument. They state: "The nursing homes' argument glosses over the fact that the appropriation bills drew revenue for the one-time grants not just from the IGT fund, but from the Title XIX fund." *Respondents' Brief 41*. To the contrary, Appellants expressly made this distinction. In fact, it is the major division in the Legal Argument section of their Brief. Point Relied On I addresses the withholding of money appropriated from the IGT Fund. Point Relied

On II addresses the withholding of money appropriated from the Title XIX Fund. The distinction is clearly drawn in Appellants' Points Relied On and adhered to in their Brief.

1. Under article IV, § 15 of the Missouri Constitution, the Governor could not withhold the federal share of the disputed payment which was federal money appropriated from the Title XIX Fund.

Respondents have no answer to Appellants' argument in Point II. In that Point, Appellants specifically relied on article IV, § 15 of the Missouri Constitution. Respondents' Brief never cites article IV, § 15, or Appellants' principal cases interpreting that section – *Committee for Educational Equality v. State*, 967 S.W.2d 62 (Mo. banc 1998), and *Mallory v. Barrera*, 544 S.W.2d 556 (Mo. banc 1976).

Respondents simply respond that the Governor's discretion under article IV, § 27 is unreviewable. *Respondents' Brief 42-43*. But, in *Cason v. Bond*, this Court analyzed the cases cited in Respondents' Brief and held that it had authority to determine whether the Governor has acted lawfully. 495 S.W.2d at 389. To determine whether the Governor had any discretion, the Court must reconcile article IV, § 15 and article IV, § 27. This Court has jurisdiction to resolve the conflict between these constitutional provisions. *Id*.

Article IV, § 15 requires federal funds to be held in trust for their federal purpose. *Appellants' Brief 70-73*. Respondents misused the federal funds intended as the federal share of Appellants' final second enhanced payments. They recycled the federal funds to themselves. If the Governor had not illegally withheld and impounded the payments due to Appellants, Appellants would have received their federal share as always.

In footnote 9, Respondents protest that the nursing homes never proved that the General Assembly actually spent the federal money for an unlawful purpose. After the State made the extra $20,700,000 first enhanced payment and received that payment back into the IGT Fund as state money, it transferred the money into administrative General Revenue Fund. *Tr. 99-100*. Money is fungible. Once that money was mingled with all of the other money in Fund 101, there was no way to determine where the money was actually spent. Article IV, § 15 was violated when the Respondents recycled to themselves (contrary to the federal purpose) this federal money intended for second enhanced payments.

This Court should recognize that the 1986 amendment to article IV, § 15 controls article IV, § 27 adopted in 1945. *State ex rel. Bd. of Fund Comm'rs v. Holman*, 296 S.W.2d 482, 491 (Mo. banc 1956). Medicaid is a federal program, which states can choose (or choose not) to participate in. *Arkansas Med. Soc'y, Inc. v. Reynolds*, 6 F.3d 519, 521-522 (8th Cir. 1993). If a state chooses to participate, it must comply with federal requirements. *Id*. The Governor's power to withhold from the Title XIX Fund does not apply to federal money, and the Title XIX Fund withholding was illegal.

CONCLUSION

For these reasons, Appellants request this Court to reverse the trial court on both Points, remand the case, and order the trial court to enter judgment in their favor.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06(g)

The undersigned certifies:

That this Brief complies with Rule 84.06(g) of this Court; and That this Brief contains 7,392 words according to the word count feature of Microsoft Word Version 1997 software with which it was prepared.

That the disks accompanying this Brief have been scanned for viruses, and to the best of his knowledge are virus-free.

That this Brief meets the standards set out in Mo. Civil Rule 55.03.

_____

CERTIFICATE OF SERVICE

I hereby certify that two (2) true and accurate copies of the foregoing, along with a disk containing its text, were served by hand-delivery, facsimile transmission, certified mail or United States mail, postage prepaid, this 19th day of November, 2002, to:

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